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8 UNITED STATES DISTRICT COURT  
9 NORTHERN DISTRICT OF CALIFORNIA  
10 SAN FRANCISCO DIVISION  
11

12 UNITED STATES OF AMERICA,

13 Plaintiff,

14 vs.

15 CHARLES CATHCART, et al.,

16 Defendants.  
17  
18  
19

Case No. C-07-4762-PJH

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
DEFENDANT ROBERT J. NAGY'S  
MOTION TO CONTINUE THE TRIAL  
DATE AND ALL ASSOCIATED  
DEADLINES**

Date: September 17, 2008

Time: 9:00 a.m.

Dept.: Room 3, 17<sup>th</sup> Floor

Trial: March 23, 2009

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**I. INTRODUCTION**

In this case Plaintiff UNITED STATES OF AMERICA ("United States") seeks an injunction against Defendant ROBERT J. NAGY ("Mr. Nagy") and Co-Defendants pursuant to sections 7402(a) and 7408 of the Internal Revenue Code ("IRC"). The United States alleges violations of sections 6700 and 6701 of the IRC.

Discovery in this matter is currently being conducted. Mr. Nagy is now requesting a continuance of the trial date and all associated deadlines so that the parties will be able to review the voluminous discovery produced to date, conduct follow-up as necessary, and properly prepare for trial.

**II. STATEMENT OF RELIEF SOUGHT**

Mr. Nagy seeks a continuance of the trial date from March 23, 2009 to May 18, 2009 (56 day continuance) and an attendant continuance of the following deadlines associated with the trial date as follows: (a) expert disclosure deadline continued from August 20, 2008 to October 15, 2008; (b) non-expert discovery cut-off continued from September 3, 2008 to October 29, 2008; (c) expert discovery cut-off continued from October 1, 2008 to November 26, 2008; and (d) deadline to hear dispositive motions continued from November 19, 2008 to January 14, 2009.

**III. BACKGROUND**

The United States initiated this action by filing a Complaint on September 17, 2007.<sup>1</sup> United States' Complaint, Dkt. 1. Mr. Nagy answered the Complaint on November 19, 2007. Answer by Robert J. Nagy, Dkt. 3. The other Defendants subsequently also answered the Complaint. In due course discovery began and presently continues.

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<sup>1</sup> This Complaint was amended for the first time on April 23, 2008. United States' First Amended Complaint, Dkt. 57.

Discovery in this matter is more complicated and time consuming than anticipated by the parties. Declaration of Tom Prountzos in Support of Defendant Robert J. Nagy's Motion to Continue the Trial Date and All Associated Deadlines ("Prountzos Declaration") ¶3. To date discovery has resulted in voluminous production of documents and materials, and more is still expected. *Id.* Thus far, for example, the United States has produced eleven (11) digital discs worth of production. *Id.* These discs contain at least 435,000 separate files. *Id.* Many of these files, moreover, contain multiple pages, including one that is 692 pages long. *Id.* Discs 7 and 8, which were produced in July, together contain more than 100,000 separate files, and Discs 9, 10 and 11, which were produced on August 15, 2008, contain over 85,000 files not including the files on Disc 10, which currently cannot be opened due to an apparent defect in the manner in which the information was saved. *Id.*

Under the current schedule the parties will be unable to meaningfully evaluate these documents and materials. *Id.* at ¶4. The parties will also be unable to conduct any necessary follow-up discovery and investigation. *Id.* Additionally, the parties need more time than provided by the present schedule so that they may obtain qualified experts and so that the experts may review all relevant materials. *Id.* If a continuance is not granted, the parties will not be able to properly prepare for trial. *Id.* at ¶6.

All parties agree that a continuance is warranted. *Id.* at ¶5. The only disagreement concerns the length of the continuance. *See id.* Most parties agree that a continuance to May 18, 2009 will be sufficient. *Id.* Counsel for Defendant CHI-HSIU HSIN and OPTECH LIMITED believes that a longer continuance is necessary and is apparently preparing his own motion to that end. *Id.* He will not stipulate to this Motion on the chance that doing so may prejudice his own motion. *Id.* With that exception, the parties are essentially in agreement. *See id.*

1 The parties previously submitted a stipulation and proposed order modifying the  
 2 scheduling order. *Id.* at ¶7. The Court did not sign this order because it may have allowed  
 3 dispositive motions to be heard less than 120 days before trial. *Id.* The present Motion  
 4 seeks to continue the trial date and all deadlines associated with the trial date. A such,  
 5 granting the continuance sought herein will not adversely affect the Court's requirement  
 6 that dispositive motions be heard at least 120 days before trial. *Id.*

7 The original trial date is March 23, 2009. Continuing the trial date to May 18, 2009  
 8 will push the trial back by less than two months. The parties believe that continuing the  
 9 trial date to May 18, 2009 would be convenient for the Court because there is only one trial  
 10 scheduled for that week and trial of the instant matter is not expected to last longer than  
 11 one week. *Id.* at ¶8. Granting this continuance should involve only a minimal disruption  
 12 of the schedule. *Id.* at ¶9.

#### 13 IV. ARGUMENT

##### 14 A. THE COURT SHOULD CONTINUE THE TRIAL DATE AND ALL 15 ASSOCIATED DEADLINES SO THAT THE PARTIES CAN COMPLETE 16 FULL DISCOVERY AND PROPERLY PREPARE FOR TRIAL

17 Whether to grant or deny a continuance is within the discretion of the court. *Ungar*  
 18 *v. Sarafite*, 376 U.S. 575, 589 (1964); *United States v. Flynt*, 756 F.2d 1352, 1358 (9<sup>th</sup> Cir.  
 19 1985). The court must use its discretion in a manner that is neither arbitrary nor  
 20 unreasonable. *United States v. Flynt, supra*, 756 F.2d at 1358. There are four factors the  
 21 consideration of which determines the propriety of a court's decision to grant or deny a  
 22 continuance. First, the court considers the diligence of the party seeking the continuance.  
 23 *Id.* at 1359. Second, the court considers the likelihood that granting a continuance would  
 24 be useful under the circumstances of the case. *Id.* Third, any resultant inconvenience to  
 25 the court and opposing party caused by a continuance must be considered. *Id.* Fourth, the  
 26 prejudice the moving party will suffer if a continuance is not granted must also be

1 considered. *Id.* These factors must be considered together, with the weight attributed to  
 2 each varying from case to case. *Id.*; *United States v. Mejia*, 69 F.3d 309, 314 (1995).  
 3 Whether a continuance should be granted depends largely on the circumstances of each  
 4 individual case. *United States v. Flynt, supra*, 756 F.2d at 1358.

### 5           **1.       The Parties Have Been Diligent**

6           This factor focuses on whether the continuance is sought due to a lack of diligence.  
 7 Prior to a proceeding where the issue was whether the defendant had the mental capacity  
 8 required to commit contempt, while the defendant was incarcerated he attempted to obtain  
 9 evidence and witnesses to prove that he did not. *Id.* at 1356, 1359-60. He filed an *ex parte*  
 10 motion to be transferred to a location where his own psychiatrists could treat him, and also  
 11 filed a *habeas* petition that noted he needed to consult with potential witnesses regarding  
 12 the up-coming hearing. *Id.* at 1359. Further, counsel for the defendant advised the court  
 13 that he had obtained three experts to examine the defendant and testify to the results but  
 14 that they could not do so under the schedule imposed by the court. *Id.* at 1359-60. The  
 15 Court of Appeals found that these actions were sufficiently diligent that this factor  
 16 weighed in favor of the defendant's motion for a continuance. *Id.* at 1360.

17           In the present case there is no suggestion that Mr. Nagy or any of the parties has not  
 18 been diligent. Whereas in *Flynt* the defendant made motions to pursue his defense prior to  
 19 the hearing, similarly in the present case the parties previously stipulated and proposed an  
 20 order to the Court modifying the scheduling order. Prountzos Declaration at ¶7. The  
 21 parties in the present case have also attempted to come to an agreement regarding the  
 22 present Motion and to stipulate to a continuance date, coming very close. *Id.* at 5.  
 23 Furthermore, it is precisely the diligence of the parties that necessitates a continuance in  
 24 this matter; voluminous documents have been produced and the parties require additional

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time to properly review, evaluate, and act on this discovery. *Id.* at 3, 6. This factor, then, should weigh in favor of a continuance.

## 2. Granting a Continuance Would Be Useful

Where granting a continuance would potentially allow a party to obtain and present relevant evidence, it would be useful and this factor weighs in favor of a continuance. *United States v. Flynt, supra*, 756 F.2d at 1360; *United States v. Mejia, supra*, 69 F.3d at 315 (“A requested continuance would be useful if it would permit the [party] to introduce evidence relevant to the issue at hand”). Parties moving for a continuance, moreover, need not specifically identify what evidence will be obtained due to the continuance. *Id.*; *United States v. Rivera- Guerrero*, 426 F.3d 1130, 1140 (9<sup>th</sup> Cir. 2005) (“When requesting a continuance, a defendant is not required to demonstrate what specific evidence he would present . . . a showing that evidence helpful to his position could be produced is sufficient”).

In *Flynt* the court found potential evidence regarding the defendant's mental state relevant to the issue of whether he possessed the capacity to commit contempt. *United States v. Flynt, supra*, 756 F.2d at 1360. Based on this, the court concluded that a continuance to allow the defendant to obtain such evidence would be useful. *Id.* The court also found that a continuance would be useful in a case where the defendant moved for a continuance so that his expert could evaluate testimony regarding involuntary medication. *United States v. Rivera-Guerrero, supra*, 426 F.3d at 1141. The court found that the defendant's expert could potentially offer testimony that would counter testimony given by the government's witnesses as to the effects of involuntary administration of anti-psychotic drugs. *Id.* Because such testimony would be relevant, this factor weighed in favor of a continuance. *Id.*

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1 In the present case there are numerous issues with respect to each Defendant. For  
 2 example, the allegation that each violated IRC §6700 raises the issues of: whether each  
 3 Defendant organized, sold, or participated in the organization or sale of an entity, plan, or  
 4 arrangment; whether each Defendant made or caused to be made false or fraudulent  
 5 statements concerning the tax benefits to be derived from the entity, plan, or arrangement;  
 6 whether each Defendant knew or had reason to know that the statements were false or  
 7 fraudulent; and whether the false or fraudulent statements pertained to a material matter.  
 8 26 U.S.C. 6700. The documents thus far produced by the United States are in response to  
 9 discovery requests designed to obtain evidence relevant to such issues. *See* Federal Rules  
 10 of Civil Procedure (“FRCP”) Rule 26(b)(1). As such, a continuance that allows full review  
 11 and analysis of these documents will potentially produce evidence relevant to these issues  
 12 that could not otherwise be obtained on the current schedule. *See* Prountzos Declaration  
 13 ¶6. As in *Flynt* and *Rivera-Guerrero* where the potential to obtain evidence relevant to the  
 14 issue at hand made the granting of a continuance useful, so too here granting a continuance  
 15 will be useful insofar as it will give the parties the opportunity to cull from the voluminous  
 16 production evidence relevant to the multitude of issues in the present case.

### 17 3. Granting a Continuance Would Result in Negligible Inconvenience

18 This factor weighs the potential inconvenience to the parties, the Court, and the  
 19 witnesses if a continuance is granted. *United States v. Mejia, supra*, 69 F.3d at 316.  
 20 Because trial has not yet commenced and in fact is many months away, specific  
 21 arrangements regarding non-party witnesses testifying at trial have likely not yet been  
 22 made. As such, non-party witnesses will not be inconvenienced if a continuance is  
 23 granted. The parties, furthermore, all agree in principle that a continuance is warranted in  
 24 this case. Prountzos Declaration ¶5. The only disagreement concerns the length of the  
 25 continuance, with only Chi-Hsiu Hsin and Optech Limited seeking a longer continuance.  
 26



1 Certainly granting the continuance sought herein will not inconvenience these parties more  
 2 than denying this Motion would. By their own representations, then, the parties will not be  
 3 inconvenienced by a continuance and this factor weighs in favor of a continuance. *See*  
 4 *United States ex rel Holder v. Special Devices, Inc.*, 296 F.Supp.2d 1167, 1178 (C.D. Cal.  
 5 2003) (Where parties were in agreement as to continuance, but did not stipulate, the court  
 6 granted a continuance).

7 The defendant in *Flynt* sought a thirty-day continuance. *United States v. Flynt*,  
 8 *supra*, 756 F.2d at 1356. The appellate court found that granting a stay in that case would  
 9 not result in cognizable inconvenience to the trial court. *Id.* at 1360. It reasoned that the  
 10 court could recalendar the proceedings because the record showed that this would not  
 11 cause any scheduling difficulties for it. *Id.* In the present case, the continuance sought is  
 12 only a few weeks longer than the continuance sought in *Flynt*. Also like *Flynt*, in this case  
 13 granting a continuance to May 18, 2009 will not cause scheduling difficulties for the court  
 14 insofar as only one trial is scheduled for that week and trial of the instant matter is not  
 15 expected to last beyond one week. Prountzos Declaration ¶8.

#### 16 4. The Parties Will Be Prejudiced Unless a Continuance Is Granted

17 If a continuance is not granted, the parties will be prejudiced because their ability to  
 18 prepare for trial will be abridged and they will be forced to proceed to trial with less than  
 19 full information and preparation. *Id.* at ¶6. For example, experts will be retained based on  
 20 partial review of documents and materials produced, and those experts will have to base  
 21 their opinions on partial discovery because there will be no time for follow-up. *Id.* In a  
 22 case such as this where denying a continuance prevents the introduction of evidence, this  
 23 factor weighs the significance of that evidence. *United States v. Mejia, supra*, 69 F.3d at  
 24 317. In this case, because the voluminous production potentially contains evidence  
 25 relevant to all issues at hand, the significance of the evidence is at least substantial and is  
 26



1 potentially astounding. If the parties are not given the opportunity to fully review all  
 2 discovery materials, they will be denied the chance to introduce evidence of potentially  
 3 pivotal importance and will consequently be heavily prejudiced. This factor, therefore,  
 4 must weigh in favor of a continuance. *See United States v. Flynt, supra*, 756 F.2d at 1361-  
 5 62 (defendant was severely prejudiced by denial of continuance which denied him chance  
 6 to present evidence regarding the essential issue before the court).

7 **B. THE SCHEDULING ORDER SHOULD BE MODIFIED BECAUSE GOOD**  
 8 **CAUSE HAS BEEN SHOWN WITH RESPECT TO THE NECESSITY OF A**  
 9 **CONTINUANCE**

10 On January 4, 2008 the Court issued an Order setting trial for March 23, 2009 and  
 11 also setting various other deadlines relative to that trial date. Case Management and  
 12 Pretrial Order, Dkt. 27. Such a scheduling order may only be modified for good cause and  
 13 with the consent of the Court. FRCP 16(b)(4). Whether good cause exists depends on  
 14 whether the party seeking modification has been diligent. *Johnson v. Mammoth*  
 15 *Recreations, Inc.*, 975 F.2d 604, 609 (9<sup>th</sup> Cir. 1992). If a party's carelessness has lead to  
 16 the request to modify the scheduling order, this is not good cause and it should not be  
 17 modified. *Id.*; *Zivkovic v. Southern California Edison Co.*, 302 F.3d 1080, 1087 (9<sup>th</sup> Cir.  
 18 2002). Conversely, where a party has been diligent but will be unable to meet the  
 19 scheduling order despite its efforts, the order may be modified. *Johnson v. Mammoth*  
 20 *Recreations, Inc., supra*, 975 F.2d at 609; *Zivkovic v. Southern California Edison Co.*,  
 21 *supra*, 302 F.3d at 1087. In other words, the focus of the inquiry is on the moving party's  
 22 reasons for seeking modification. *Johnson v. Mammoth Recreations, Inc., supra*, 975 F.2d  
 23 at 609.

24 As shown above, the parties in the instant case have been diligent. It is the diligent  
 25 effort of the parties to request and produce the voluminous discovery materials that  
 26 necessitates a continuance, not carelessness. *See* Prountzos Declaration ¶13. The volume of

1 production requires more time for the parties to review and analyze the contents so that  
 2 they may act accordingly and properly prepare for trial. *Id.* at ¶¶4, 6. The present case is  
 3 therefore unlike a case where plaintiff requested modification of the scheduling order after  
 4 the cut-off date for joining additional parties. *Johnson v. Mammoth Recreations, Inc.*,  
 5 *supra*, 975 F.2d at 606-7. Plaintiff's counsel had failed to name the proper defendant,  
 6 even though counsel for the named defendant brought this to his attention in the answer, in  
 7 response to interrogatories, and in a letter explicitly offering to stipulate to a substitution of  
 8 the proper defendant. *Id.* at 609. The court found that counsel for plaintiff "filed  
 9 pleadings and conducted discovery but failed to pay attention to the responses they  
 10 received." *Id.* at 610. This, the court concluded, is not diligent conduct and is the type of  
 11 shoddy case management Rule 16 seeks to eliminate. *Id.* Consequently, plaintiff failed to  
 12 show good cause. *Id.* In contrast, in the present matter, a continuance is necessary not  
 13 because the parties have simply failed to pay attention to discovery responses, but because  
 14 the discovery responses have been so voluminous that they have been unable to review and  
 15 analyze all the materials produced. Prountzos Declaration ¶3-4. In this case modification  
 16 of the scheduling Order is warranted because good cause has been shown with respect to  
 17 the necessity of a continuance. Without a continuance the parties cannot reasonably meet  
 18 the pretrial schedule and cannot properly prepare for trial despite their diligent efforts. *Id.*  
 19 at ¶6. A modification of the scheduling order to continue the trial date and all associated  
 20 deadlines is therefore warranted. *Johnson v. Mammoth Recreations, Inc.*, *supra*, 975 F.2d  
 21 at 609; *Zivkovic v. Southern California Edison Co.*, *supra*, 302 F.3d at 1087

## 22 V. CONCLUSION

23 Due to the voluminous production and length of discovery that was unanticipated  
 24 by the parties a continuance is necessary so that the parties may fully review and analyze  
 25 the documents and materials that have thus far been produced, may conduct follow-up  
 26

1 discovery and investigation as necessary, may engage experts who may then base their  
2 opinions on the results of full discovery, and so that the parties may properly prepare for  
3 trial. Modifying the scheduling Order to continue the trial date and all associated  
4 deadlines is warranted because good cause has been shown insofar as the parties have been  
5 diligent but will not be able to properly prepare for trial under the current schedule despite  
6 their diligent efforts. Therefore, the trial date should be continued to May 18, 2008 and all  
7 associated deadlines should be continued relative to the new trial date.

8  
9 DATED: September 4, 2008

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